BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

There is no reported decision of the County Court of Nueces County, Texas, in this case. Accordingly, the judgment (see page 11 of record) rendered by said Court, together with the Findings of Fact and Conclusions of Law (see page 12,14 of record) comprise, as fully as possible, the opinion or basis for the Court's ruling.

II.

Jurisdiction.

For basis of jurisdiction of this Court see petition, page 3.

III.

Statement of the Case.

For statement of the case see petition, page 1.

IV.

Assignment of Errors.

Petitioner assigns as errors the rulings of the County Court upon the questions set forth in the petition, page 3.

V.

Argument.

Point 1.

THE DECIDING OF MATERIAL QUESTIONS OF FACT BY A COURT, WITHOUT THE HEARING OF ANY EVIDENCE WHATEVER, IS SO ARBITRARY AND BASELESS AS TO BE A DEPRIVATION OF DUE PROCESS OF LAW.

In this case, involving a Federal statute, your petitioner is requesting a Writ of Certiorari for the reason that in the trial of the cause below the County Court of Nueces County, Texas, did decide material questions of fact without hearing any evidence whatever, (see Statements of Fact and Conclusions of Law, page 12,14 of record) thereby denying petitioner due process of law as guaranteed him by the United States Constitution.

A review of Court decisions will reveal that no satisfactory definition of due process has been formulated and the question for solution in each case is to be determined in view of the particular facts and circumstances. Further, it is well recognized that the mere fact that a person is unsuccessful in a Court in a matter involving life, liberty, or property does not show that there has been a violation of the due process of law guaranty; provided, there has been a full hearing or opportunity for hearing, 16 C.J.S. #622, p. 1265; 6 R.C.L. #442, p. 446, #446, p. 450. However, if a Court proceeds in such a manner as to deny a party the opportunity to be heard and prosecute his rights, then that Court can be said to have committed a mistake so gross and obvious as to come within the boundary of arbitrary action, thereby committing a violation of the due process guaranty, and any judgment rendered therein is not entitled to respect in any other tribunal, Windsor v. McVeigh, 93 U.S. 274.

The County Court below, in deciding material questions of fact without hearing any evidence whatever and without going into the merits of the case, (see Statements of Fact and Conclusions of Law, page 13,14 of record) denied your petitioner a fair hearing. A fair hearing, as we understand it, is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken, 12 Am. Jur. #608, p. 303; 6 R.C.L. #446, p. 450; Akron, C. & Y. R. Co. v. United States, 261 U.S. 184, p. 200. "The right to a hearing as administered in the Courts, requires a judicial examination of every issue that, according to established procedure, may affect the attainment of a legal trial, and in such a trial determine the cause according to law," 9 Tex. Jur. #132, p. 576. That a party is entitled to present evidence in support of his rights can hardly be denied, and to preclude, before any type of judicial or quasi-judicial tribunal, a party

from offering evidence in support of his position is a denial of fair hearing and a fortiori a denial of due process of law, Roberts v. Anderson, 66 F. (2) 874; 16 C.J.S. #622, p. 1265, 1266; Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, p. 304; Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F. (2) 788; 6 R.C.L. #449, p. 453, #450, p. 454; Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 N. E. 431.

In the case at Bar inasmuch as the County Judge took upon himself the task of deciding material questions of fact without the determination of such questions by the jury, as requested by your petitioner, and without the hearing of any evidence whatsoever on such questions, it is the belief of your petitioner, in view of the aforementioned authorities, that the Honorable County Judge did deny your petitioner his constitutional right to due process of law.

Point 2.

WHERE AN ISSUE OF FACT, NECESSARY TO THE RENDITION OF A PROPER JUDGMENT, IS RAISED BY THE PLEADINGS A JUDGMENT RENDERED BY THE COURT WITHOUT HEARING ANY EVIDENCE OR PROOF ON SUCH ISSUES IS ERRONEOUS AND WILL NOT SUPPORT THE JUDGMENT.

The respondent herein and defendant below, by its Plea in Abatement, raised the following issues of fact:

1. That defendant was not within the scope of the Federal Fair Labor Standards Act in that defendant was engaged in intra-state commerce.

2. That defendant's services were strictly done within the area of production of crop commodity.

3. That plaintiff was not employed by the defendant in excess of fourteen (14) weeks during the entire year.

4. That defendant is engaged in compressing cotton and is exempt from the regulations of the Federal Fair Labor Standards Act.

The matters plead by defendant in abatement of the plaintiff's cause of action, as above set out, all depend upon questions of fact. These facts were not established by evidence or proof, nor was any attempt made to present any proof or evidence on the issues so raised.

It is a fundamental proposition of law that the mere averment of facts set up in abatement of a suit without proof of such facts is insufficient, Schaff v. Nash 193 S.W. 469; Lyons Bros. v. Corley 135 S.W. 603.

Volume One, Texas Jurisprudence, page 181, #131, sufficiently states the law that mere averments of fact without proof are insufficient. This proposition is further affirmed in McCall v. Owens 68 S.W. 2nd 1089. Also, see Brown v. Brown 65 S.W. 2nd 398, and McKnight v. Washington National Insurance Company 131 S.W. 2nd 1072.

Certainly in this cause the matters contained in respondent's Plea in Abatement did not appear on the face of the record so as to enable the Honorable County Judge to decide, as a matter of law, the question raised by the pleadings herein, and the County Judge was in error in overruling petitioner's exception to the respondent's Plea, particularly where the respondent submitted no evidence to support the allegations of his Plea. It can hardly be denied that the burden was on respondent to prove the essential facts set forth in his Plea in Abatement, see 1 Texas Jurisprudence, page 180.

In our own jurisdiction here in Texas, our Courts have repeatedly enunciated the proposition that a judgment to be sustained in a Court of Record must be founded on sufficient facts legally ascertained, see Blalock v. Jones, 1 S.W. 2nd 400; John Christesen & Co. v. McNeil, 251 S.W. 351; McCorkey v. Henderson, 24 Texas 212; M. P. Ry. Co. v. Haynes 18 S.W. 605. And it must follow that even an issue properly raised and

plead, without any evidence to support it, can form no basis for judgment.

It matters not how well a case may be plead. There must be evidence as well as pleading to support a proper judgment and our Texas Courts have repeatedly held that even though some evidence is presented, which, of course, was not done in the case at Bar, such evidence must support the pleadings, Matrimonial Mutual Association of Texas v. Rutherford, 41 S.W. 2nd 719.

We submit to the Court that the matters urged in respondent's Plea in Abatement are each and all questions of fact, and that the Honorable County Judge of the County Court of Nueces County, Texas, erred in determining such facts without the hearing of evidence thereon and that the judgment thereby rendered is erroneous as having no evidence to support it. It should be further noted that in all events the fact issues here involved should have been submitted to the jury, requested by petitioner, for their determination, Revised Civil Statutes of Texas, 1925, Article 2123.

Point 3.

THE COUNTY COURT ERRED IN DENYING PETITIONER THE RIGHTS ACCORDED HIM BY VIRTUE OF THE FEDERAL FAIR LABOR STANDARDS ACT of 1938, IN THAT:

(A) THE COURT DID NOT HEAR ANY EVIDENCE IN SUPPORT OF PETITIONER'S CONTENTIONS.

(B) THE FEDERAL FAIR LABOR STANDARDS ACT of 1938 PROVIDES THAT AN EMPLOYEE "ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE" SHALL BE PAID TIME AND A HALF FOR OVERTIME.

(A)

In view of the first point in the argument showing, we trust, the denial of due process occasioned by the arbitrary action of the County Court it goes without saying that any judgment rendered by such a summary proceeding should be reversed. Likewise, when a right is claimed in a State Court

arising under a statute of the United States, a question is presented reviewable by this Court, Supreme Lodge, etc., v. Knights of Pythias of North America, etc., 102 Miss. 280, 59 So. 88. Accordingly, it is the contention of your petitioner that inasmuch as the County Court did not give the Federal Fair Labor Standards Act of 1938, Title 29, Ch. 8, U.S.C.A., and its applicability to the factual situation involved in the case at Bar the full, serious, consideration due such law that this Court, in view of the Knights of Pythias case above cited, should issue certiorari and accord the matter the due consideration it warrants.

(B)

The County Court not having permitted the introduction of evidence this point must be discussed as an abstract proposition accompanied by assumption of facts--which facts would have been proven had not the County Court acted so summarily in reaching its decision. Assuming then that it could be proved, as alleged, that your petitioner transferred bales of compressed cotton from respondent's plant and warehouses a distance of approximately two miles to ships docked in Corpus Christi's harbor, which ships subsequently carried the said cotton to points outside of the State of Texas, and that your petitioner received from respondent, Port Compress Company, twenty-five cents an hour for all hours worked, and that for five successive weeks he worked a substantial number of hours in excess of forty-four hours in any one week, then----the question is, "Is petitioner, Roland, entitled to pay at the rate of one and a half times his regular rate of pay for overtime as provided by Section 207 (a) of the Federal Fair Labor Standards Act."

Before answering the question presented we must first ascertain whether or not his duties were such as to come within the coverage of the Act which applies to the "employees who are engaged in commerce or in the production of goods for commerce,"

Section 206 (a), Title 29, Ch. 8, U.S.C.A. The term "commerce" as defined by the Act, Section 203 (b), means "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Employee work of most any type done on or in connection with goods that flow in commerce comes within the comprehensive term of "production" and thus makes such person and/or his employer subject to regulation by Federal laws enacted by virtue of the commerce clause of the United States Constitution. In Stafford v. Wallace, 258 U.S. 495, (which case upheld the constitutionality of the Packers and Stockyards Act of 1921; which Act provided for the supervision by Federal authority of the business of the commission men and of the live stock dealers in the great stockyards of the country) this Court said, "The commission men are essential in making the sales, without which the flow of the current (of commerce) would be obstructed, and this, whether they are made to packers or dealers." In view of that decision it is the opinion of your petitioner that his job of transferring cotton to ships destined to leave the State was an essential element in the movement of cotton from Texas to places outside thereof, and thus that he is entitled to the benefits and regulations imposed by the Federal Fair Labor Standards Act.

It is recognized by your petitioner that Section 207 (c) of the Federal Fair Labor Standards Act provides, "In the case of an employer engaged in----the ginning and compressing of cotton,-----the provisions of subsection (a) (which subsection provides an employee shall be paid at the rate of one and one-half times his regular rate of pay for all hours worked in excess of forty-four (44) hours in any one week) shall not apply to his employees in any place of employment where he is so engaged;-----." At first blush it might seem, in view of Section 207 (c), that the respondent, Port Compress Company, is exempt from the Act, but when the legislative history of the Act is considered, in-

cluding the Congressional debates in regard to such exemption, it is to be seen that the law means as it reads, that is, that the exemption applies only to employees in the place of the compressing operations or so closely associated therewith as to become a part of the compressing operations------and, thus excludes from such exemption those employees performing non-associated functions, as in the case at Bar, of driving loaded tractors from plant and warehouse to the ship docks. The provision of Section 207 (c) has been mentioned at this time merely in anticipation of respondent's answer to this petition for Writ of Certiorari, and should your petitioner be correct in the anticipated defense of respondent, then he shall be pleased to submit a more full brief on this provision after the filing of respondent's answer.

CONCLUSION

As the case now stands it appears to your petitioner that the Federal Fair Labor Standards Act did vest in him a right for additional compensation for overtime--which right the County Court did deny by failing not only to give proper consideration to the Federal Fair Labor Standards Act itself, but by arbitrarily deciding questions of fact material to the entire case and decision without the taking by said Court of any evidence whatsoever. Such a miscarriage of justice, petitioner submits for the reasons set forth in the petition, presents a case that calls for the exercise of this Court's power of review.

Respectfully submitted,

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